

June 15, 2016

The Honorable Valerie E. Caproni
United States District Judge
Southern District of New York
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Re: United States v. Kevin Johnson, 15 Cr. 565 (VEC)

Dear Judge Caproni:

Yesterday the New York City Office of Chief Medical Examiner (“OCME”) was served with a subpoena in this matter so ordered by this Court on June 14, 2016, requiring the production forthwith of “the source code for the Forensic Statistical Tool (FST) in its ‘native file formats’” (the “FST Source Code Subpoena”). For the reasons summarized below, the OCME intends to move to quash the FST Source Code Subpoena. Accordingly, we respectfully request until June 28, 2016 to make that motion, as well as an opportunity to reply to defendant’s answer to that motion. The OCME further requests that this Court suspend the operation of the FST Source Code Subpoena pending the determination of the OCME’s Motion to Quash.

The OCME has ample basis to move to quash the FST Source Code Subpoena, both on the basis of the City’s copyright and proprietary ownership of the source code, and because defendant does not need the source code to adequately challenge either the FST itself or the results of OCME’s DNA testing in this matter.

The FST Source Code is Copyrighted and Proprietary

The New York City OCME Department of Forensic Biology is the largest public DNA laboratory in North America. It is accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board and by the New York State Forensic Science Commission; indeed, it passed its last accreditation inspection with a perfect score. Established in the 1930’s, it has long prided itself on the breadth and quality of its forensic work, and it remains in the forefront of research and forensic science. It was the first United States forensic DNA laboratory to implement such cutting-edge techniques as male-specific Y-STR testing, high sensitivity DNA testing, as well as the Forensic Statistical Tool at issue in this proceeding, which was needed to interpret complex DNA mixtures.

The City of New York expended considerable time and financial resources to create and develop FST, at a time when no commercial products were able to reliably quantify the likelihood that a particular suspect’s DNA rather than the DNA of an unknown, unrelated person was included in a

mixture of DNA from up to three individuals. The FST source code and software were copyrighted and are owned by the City of New York. These property rights should be respected where, as is the case here, they would not abrogate defendants' constitutional rights. *See People v. Chubbs*, 2015 Cal. App. Unpub. LEXIS 105 (Ct. App. Cal., 2nd AD, Div. 4, Jan 9, 2015).

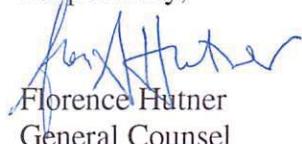
Defendant Has Not Met His Burden of Demonstrating a Need for the FST Source Code or the Subpoena

In order to sustain his burden for issuance of a subpoena pursuant to Rule 17, defendant must show that the source code is, *inter alia*, relevant and evidentiary, that he cannot prepare for trial without the source code, and that his request for the source code is more than a mere "fishing expedition." *See U.S. v. Nixon*, 418 U.S. 683, 699-700 (1974). Defendant has failed to meet this burden. Contrary to his assertions, the information he claims to need does not exist solely within the source code, but rather is available to him from documentation already available to him, including the FST validation studies. The OCME's motion will address apparent misapprehensions by defendant's counsel and will clarify how defendant has access to the needed information. Indeed, defendant's submission of May 27, 2016 abundantly demonstrates that defendant, with his retained experts, already have the information necessary to fully cross-examine the Government's witnesses concerning the reliability of the FST program, as well as any errors that the defense perceives in the program.

In sum, because of the City's proprietary interest in this valuable product, and because defendants' constitutional rights can fairly and adequately be ensured through cross-examination without need for disclosure of the source code, the OCME has a sufficient basis to seek to quash the FST Source Code Subpoena.

Thank you for your consideration of this request.

Respectfully,



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c: (*via email*)

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